

# State of South Dakota

## EIGHTY-FIFTH SESSION LEGISLATIVE ASSEMBLY, 2010

400R0400

### HOUSE BILL NO. 1065

Introduced by: The Committee on Judiciary at the request of the Office of the Attorney General

1 FOR AN ACT ENTITLED, An Act to establish quarterly escrow payments by nonparticipating  
2 tobacco manufacturers.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 10-50B-7 be amended to read as follows:

5 10-50B-7. Any tobacco product manufacturer selling cigarettes to consumers within the  
6 state, on or after July 1, 1999, whether directly or through a distributor, retailer, or similar  
7 intermediary or intermediaries, shall do one of the following:

8 (1) Become a participating manufacturer, as that term is defined in section II(jj) of the  
9 Master Settlement Agreement, and generally perform its financial obligations under  
10 the Master Settlement Agreement; or

11 (2) Place into a qualified escrow fund ~~by April fifteenth of the year following~~ for the year  
12 in question the following amounts, as such amounts are adjusted for inflation:

13 (a) For 1999: \$.0094241 per unit sold after the date of enactment of §§ 10-50B-1  
14 to 10-50B-10, inclusive;

15 (b) For 2000: \$.0104712 per unit sold;



- (c) For each of 2001 and 2002: \$.0136125 per unit sold;
- (d) For each of 2003 through 2006: \$.0167539 per unit sold;
- (e) For each of 2007 and each year thereafter: \$.0188482 per unit sold.

Beginning in 2010, the escrow fund deposits required by this section shall be made in quarterly installments. For purposes of this section, the calendar year shall be divided into the following quarters: January first to March thirty-first, inclusive; April first to June thirtieth, inclusive; July first to September thirtieth, inclusive; and October first to December thirty-first, inclusive. The deposit for the first two quarters of 2010 shall be made by August 31, 2010. The first quarterly deposit for each year thereafter shall be made by May thirty-first of each year. The second quarterly deposit shall be made by August thirty-first of each year. The third quarterly deposit shall be made by November thirtieth of each year. The fourth quarterly deposit shall be made by April fifteenth of the following year.

For each of the first three quarters, the quarterly deposit shall be based upon units sold in that quarter together with an estimated inflation adjustment provided by the attorney general. The fourth quarterly deposit shall be based upon units sold in that quarter. In addition, the fourth quarterly deposit shall include the inflation adjustment for all units sold during the entire year, as set forth in the Master Settlement Agreement, less any amounts previously paid as estimated inflation adjustments for that year.

The attorney general may require production of information sufficient to enable the attorney general to determine the adequacy of the amount of the quarterly installment deposit.

Section 2. That § 10-50B-9 be amended to read as follows:

10-50B-9. Each tobacco product manufacturer that elects to place funds into escrow shall ~~annually~~ quarterly certify its compliance with § 10-50B-7 to the attorney general. The attorney general may bring a civil action on behalf of the State of South Dakota against any tobacco

product manufacturer that fails to place into escrow the funds required. Any tobacco product manufacturer that fails in any ~~year~~ quarter to place into escrow the funds required by § 10-50B-7 shall:

(1) Within fifteen days place such funds into escrow as shall bring it into compliance with § 10-50B-7. The court, upon a finding of a violation of § 10-50B-7, may impose a civil penalty to be paid to the state general fund in an amount not to exceed five percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent of the original amount improperly withheld from escrow;

(2) In the case of a knowing violation, within fifteen days place such funds into escrow as shall bring it into compliance with § 10-50B-7. The court, upon a finding of a knowing violation of § 10-50B-7, may impose a civil penalty to be paid to the state general fund in an amount not to exceed fifteen percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent of the original amount improperly withheld from escrow; and

(3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state, whether directly or through a distributor, retailer, or similar intermediary, for a period not to exceed two years.

Section 3. That § 10-50B-10 be amended to read as follows:

10-50B-10. Each failure to make ~~an annual~~ a quarterly deposit required under § 10-50B-7 constitutes a separate violation.

Section 4. That chapter 10-50B be amended by adding thereto a NEW SECTION to read as follows:

If any portion of this Act is held by a court of competent jurisdiction to be unconstitutional,

1 then this Act is deemed repealed and the provisions of chapter 10-50B are deemed unaltered.  
2 Neither any holding of unconstitutionality nor the repeal of this Act affects, impairs, or  
3 invalidates any other portion of § 10-50B-7, or the application of the section to any other person  
4 or circumstance, and such remaining portions of § 10-50B-7 shall at all times continue in full  
5 force and effect.

6 Section 5. That § 10-50B-8 be amended to read as follows:

7 10-50B-8. A tobacco product manufacturer that places funds into escrow pursuant to  
8 ~~subdivision 10-50B-7(2)~~ § 10-50B-7 shall receive the interest or other appreciation on such  
9 funds as earned. Such funds themselves shall be released from escrow only under the following  
10 circumstances:

- 11 (1) To pay a judgment or settlement on any released claim brought against such tobacco  
12 product manufacturer by the state or any releasing party located or residing in the  
13 state. Funds shall be released from escrow under this subdivision in the order in  
14 which they were placed into escrow and only to the extent and at the time necessary  
15 to make payments required under such judgment or settlement;
- 16 (2) To the extent that a tobacco product manufacturer establishes that the amount it was  
17 required to place into escrow on account of units sold in the state in a particular year  
18 was greater than the Master Settlement Agreement payments, as determined pursuant  
19 to section IX(I) of that agreement including after final determination of all  
20 adjustments, that such manufacturer would have been required to make on account  
21 of such units sold had it been a participating manufacturer, the excess shall be  
22 released from escrow and revert back to such tobacco product manufacturer; or
- 23 (3) To the extent not released from escrow under subdivision (1) or (2) of this section,  
24 funds shall be released from escrow and revert back to such tobacco product

1 manufacturer twenty-five years after the date on which they were placed into escrow.